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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No 77-981

M.R.T.S., INC., a California corporation, dba CLASSIC CAT THEATER,

Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Appellees.

ON APPEAL FROM THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

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Appellees.

JURISDICTIONAL STATEMENT

DECISIONS OF THE COURTS BELOW

This is an appeal from a decision of the Court of Appeal of the State of California, Fourth Appellate District, denying appellant's petition for writ of review. The decision was made without opinion on October 11, 1977. On November 10, 1977, the California Supreme Court denied appellant's petition for hearing, also without opinion.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(a) The Nature of the Proceedings and the Statute Pursuant to Which it is Brought

This proceeding involves an order made by appellee Department of Alcoholic Beverage Control of the State of California (hereinafter referred to as "A.B.C." or as "the Department"). The order suspended appellant's license to sell alcoholic beverages. The order of suspension was made following an administrative hearing pursuant to Article 20, Section 22 of the California Constitution and Section 24200 of the California Business and Professions Code.

Following the adoption of the decision suspending appellant's license, appellant appealed to appellee Alcoholic Beverage Control Appeals Board of the State of California (hereinafter referred to as "the Appeals Board"). The appeal was heard and decided pursuant to the provisions of Article 20, Section 22 of the California Constitution and Sections 23080 - 23089 of the California Business and Professions Code.

The Department's decision was affirmed by the Appeals Board.

The only judicial review available under California law from a decision of the Appeals Board is a petition for writ of review pursuant to §§ 23090 - 23090.7 of the California Business and Professions Code. Appellant's petition for writ of review was denied without opinion by the California Court of Appeal. Appellant's petition for hearing was denied without opinion by the California Supreme Court.

(b) Dates of Judgment or Decrees Below

The decision of the Department suspending appellant's license was made on February 17, 1977. A copy of the decision is included herein as "Appendix A".

The decision of the Appeals Board was made on September 13, 1977. A copy of the decision is included herein as "Appendix B".

The order of the Court of Appeal of the State of California denying the petition for writ of review was made on October 11, 1977. A copy of the order is included

herein as "Appendix C".

The order of the California Supreme Court denying the petition for hearing was made on November 10, 1977. A copy of the order is included herein as "Appendix D".

Appellant's Notice of Appeal to this Court was filed November 16, 1977. A copy is included herein as "Appendix E".

(c) Statutory Provisions Believed to Confer Jurisdiction

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1257(2). The administrative proceedings below were based upon appellant's alleged violation of Title 4, California Administrative Code, § 143.3, which was alleged below by appellant and is alleged herein to be unconstitutional.

(d) Cases Believed to Sustain the Jurisdiction

An administrative order of a state agency is a "state statute" within the meaning of 28 U.S.C. § 1257(2), Sultan Ry. & Timber Co. v. Department of Labor of State of Washington (1928) 277 U.S. 135,

48 S.t. 505, 72 L.Ed. 820. This appeal is not moot merely because the 20-day suspension has been served, since the final order of suspension can have substantial adverse consequence in future cases. Sibron v. State of New York (1968) 392 U.S. 40, 88 S.Ct. 1889.

(e) Text of State Statute Involved

California Department of Alcoholic Beverage Control Rule 143.3 is officially published as Title 4, California Administrative Code, § 143.3. The full text of the rule is included herein as "Appendix F".

QUESTIONS PRESENTED

1. The constitutionality of Rule 143.3 was affirmed by this Court in California v. La Rue (1972) 409 U.S. 109. The ultimate question presented herein is whether La Rue retains any validity in light of the decision in Craig v. Boren (1976) 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397, which limited the Twenty-First Amendment to validation of state laws which regulate interstate commerce in alcoholic beverages.

2. May a state liquor licensing agency enact a rule which generally permits live entertainment but which prohibits nudity on the part of performers without a regard to whether their performances are obscene?

3. Was appellant denied freedom of speech and equal protection of the laws when its license to sell alcoholic beverages was suspended solely because dancers performing on a stage appeared nude?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Appellant M.R.T.S., Inc. is engaged in business as the Classic Cat Theater in the City of La Mesa, County of San Diego, State of California. Appellant holds an on-sale general license for its premises, which authorizes sale of distilled spirits, wine and beer for consumption on the premises.

On or about April 16, 1976, appellee Department of Alcoholic Beverage Control filed an accusation which alleged that appellant had permitted female performers to expose their pubic hair in violation of Rule 143.3(1)(c). On October 28, 1976, an

evidentiary hearing was held before Willis Mevis, an Administrative Law Judge of the Office of Administrative Hearings of the State of California, at which the following evidence was given. (References are to the reporter's transcript of the proceedings.)

Appellant's premises are located in the City of La Mesa (R.T. p. 3). On the exterior there is a sign stating "Classic Cat Theater" (R.T. pgs. 13, 38) and another stating "Classic Cat Theater Presents Live Nude Shows" (R.T. p. 38). Cards entitling the purchaser to admission for one year are sold for two dollars (R.T. p. 39). Appellant holds a city business license to operate a theater (R.T. p. 39). Inside the premises there is a stage in one corner. There is a counter around the stage, with chairs; beyond that are cocktail tables with chairs (R.T. pgs. 14, 17, 49). At the time of the hearing the seats were bolted to the floor and were theater type seats, but they had not been installed at the times covered in the accusation (R.T. pgs. 48-49). The premises also has a bar area with seating, a game area with pool tables and a dinner area with booths where

lunch and dinner is served (R.T. pgs. 50-52).

Kenneth Clark, an A.B.C. special investigator, testified regarding the allegations in the accusation. He visited the Classic Cat on March 12, 13, 18 and 20, 1976. On the first occasion he purchased an admission card for two dollars. On each occasion he observed female dancers who performed on the stage while nude, allowing him to observe their pubic hair. There was nothing unusual about the dances other than the performers' nudity. They were ordinary go-go dance routines, with no lewd gestures (R.T. pgs. 3-12).

At the conclusion of the evidentiary hearing the Administrative Law Judge made a proposed decision suspending appellant's license for twenty days. The proposed decision was adopted by the Department on February 17, 1977.

Appellant then filed an appeal to the Appeals Board. On September 13, 1977, the appeals Board affirmed the order of suspension. The Appeals Board held in its written opinion that the constitutionality of

Rule 143 had been established by California v. La Rue (1972) 409 U.S. 109 and that La Rue had not been overruled by Craig v. Boren (1976) 97 S.Ct. 451. The opinion of the Appeals Board appears as Appendix "B".

Appellant's petition for writ of review, which raised the same constitutional claims, was denied by the California Court of Appeal on October 11, 1977. On November 10, 1977, the California Supreme Court denied appellant's petition for hearing. The following day, on November 11, 1977, the Department placed the 20 day suspension into effect. On November 11, 1977, upon receiving the order of suspension, appellant filed a petition for stay order with this Court, which was denied by Justice Rehnquist on November 14, 1977.

ARGUMENT IN SUPPORT OF JURISDICTION

I

A.B.C.RULE 143.3 IS, ON ITS FACE AND AS APPLIED HEREIN, UNCONSTITUTIONALLY OVERBROAD AND A DENIAL OF EQUAL PROTECTION BECAUSE IT PROHIBITS ENTERTAINERS IN LICENSED ESTABLISHMENTS FROM APPEARING NUDE; THE OPINION IN CALIFORNIA v. LA RUE UPHOLDING THE CONSTITUTIONALITY OF RULE 143.3

SHOULD BE OVERRULED BECAUSE SUBSEQUENT OPINIONS HAVE LEFT IT WITHOUT RATIONAL SUPPORT.

A. Introduction

In 1972 this Court held in California v. La Rue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d, that A.B.C. Rule 143.3 was facially constitutional, notwithstanding that it prohibited performances that were protected by the First Amendment, because the state's power to enact the "Rule" was "strengthened" by the Twenty-First Amendment. In 1976 this Court held in Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451 that an Oklahoma statute that was otherwise invalid under the Fourteenth Amendment was not "strengthened" by the Twenty-First Amendment and was unconstitutional on its face. In this brief we shall show that Craig v. Boren has eviscerated the rationale of La Rue and requires that it be overruled.

In the course of this argument, a number of points will be discussed in detail. In summary, they are as follows:

1. Dance, as a medium of public entertainment, is a mode of expression

protected by the First Amendment.

2. Dance does not lose its status as protected speech merely because it is presented in a bar or other premises licensed to sell alcoholic beverages.

3. Dance does not lose its character as protected speech merely because it is erotic or the performers appear nude, unless, applying constitutional tests, it is obscene.

4. A finding that Rule 143.3 was unconstitutional was avoided in California v. La Rue by reference to the alleged "strengthening power" of the Twenty-First Amendment.

5. No case other than California v. La Rue has held that the Twenty-First Amendment authorizes states to invade constitutional rights in the name of alcoholic beverage regulation.

6. Craig v. Boren recognized that the Twenty-First Amendment only modifies state regulatory power vis a vis the commerce clause, and thus fatally contradicted California v. La Rue.

7. Insofar as it prohibits dancers from appearing nude (that is, as applied in the instant case), Rule 143.3 is unconstitutional because:

(a) It prohibits speech which is protected by the United States and California Constitutions.

(b) It invidiously discriminates between permitted and prohibited entertainment on the basis of its content.

B. Analysis of Rule 143.3

Rule 143.3 provides as follows in pertinent part:

"Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals and therefor no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit

any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron."

Analysis of Rule 143.3 discloses the following features:

1. It generally permits live entertainment in premises licensed to sell alcoholic beverages by the drink (e.g., bars, restaurants, theaters and other places holding on-sale licenses).

2. It specifically permits entertainers on a stage to expose their breasts and buttocks.

3. Certain conduct is prohibited in the presentation of live entertainment on the basis of its sexual content, but not on the basis of whether it is obscene.

4. The sexual acts and displays listed in paragraph (1) are prohibited even if they are simulated.

5. Subdivision 1(b) prohibits the touching of breasts, buttocks, anus or genitals, even if accidental or without erotic intent.

6. Subdivision 1(c) does not prohibit nudity as such, but the prohibition listed would generally prevent nudity.

Thus, the rule not only prohibits what Justice Rehnquist has termed "the customary 'barroom' type of nude dancing" (Doran v. Salem Inn, Inc. (1975) 422 U.S. 922, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648) but any play which involves nudity or simulated sexual activity. To cite just one example, the highly regarded play "Equus"[1/] would violate all three subdivisions since it had scenes which involved display of the pubic hair and genitals, the touching, caressing and fondling of breasts, and simulated sexual intercourse and masturbation. Rule 143.3 would prevent its production in a dinner theater or other theater where the license includes the room where the play is presented.[2/]

1/ "Equus & Shivings", Peter Shaffer; Antheneum Publishers, 1974.

2/ Dinner theaters serve food and drink and commonly offer presentations of musical reviews or light comedies. The Los Angeles Times for October 2, 1977 lists 18 "cabaret and dinner theaters" in Los Angeles and Orange Counties. (Calendar Section, pg. 56).

C. Dance, as a Medium of Public Entertainment, Is a Mode of Expression Protected by the First Amendment

In the landmark case In re Giannini (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535, the California Supreme Court discussed at length the nature of the dance and concluded that dancing was a form of expression protectable by the First Amendment. The court began by observing that:

> "...the very definition of a dance describes it as an expression of emotion and ideas." (72 Cal.Rptr. at 658)

The court went on to find that dancing was analogous to other forms of communicative entertainment, such as theatrical entertainment and motion pictures which have been held to be within the protection of the First Amendment. The court also specified that such First Amendment protection was not limited to formal dance such as ballet, but extended even to a topless dance in a nightclub:

> "...the performance of the dance indubitably represents a medium of protected expression. To take but

> one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions and feelings. Similarly, Iser's dancing, however vulgar and tawdry in content might well involve communication to her audience." (72 St. at 660)

This Court has concurred in the same result. Doran v. Salem Inn, Inc., supra, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648: (See argument below)

D. Dance Does Not Lose Its Status as Protected Speech Merely Because It Is Presented in a Bar or Other Premises Licensed to Sell Alcoholic Beverages or Because It Is Erotic Or the Performers Appear Nude Unless, Applying Constitutional Tests, It Is Obscene

In re Giannini was an obscenity case, and the court held that the topless performance in question was entitled to prima facie protection of the First Amendment unless it was proved to be obscene. However, the court followed a different approach four years later in Crownover v. Musick

(1973) 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497, which concerned the constitutionality of local ordinances which prohibited topless and bottomless entertainment in various public places other than theaters, concert halls or similar places. Crownover concluded with an observation that:

> "Sections 318.5 and 318.6 of the Penal Code authorizing such ordinances were enacted after our decision in In re Giannini . . . To the extend that it is inconsistent with the views expressed herein Giannini is overruled." (9 Cal.3d at 431, 107 Cal.Rptr. at 698)

Since the court gave no other explanation as to how its decision was inconsistent with Giannini or what part of Giannini was overruled, a further analysis of Crownover is necessary.

Crownover did not overrule the holding that dance is protected by the First Amendment, instead it focused on the question of whether nudity is protected, and conlcuded that it was not.

> "It is clear that these ordinances are directed at conduct - topless and bottomless exposure - and not at speech or at conduct which is 'in essence' speech or 'closely akin to speech.' . . . They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she must have some clothes on. In a word the ordinances regulate conduct." (9 Cal.3d at 425, 97 Cal.Rptr. at 694)

Thus, what the California Supreme Court held was that First Amendment protection for the dance could be avoided by an ordinance which focused on a portion of the performance, namely the performer's attire or lack of it.

The next step in our argument is to demonstrate that Crownover is erroneous both in its result and in its reasoning. A.B.C. Rule 143.3(1)(c) is essentially the same as the ordinances upheld in Crownover. Therefore, if Crownover were correct it would be dispositive of the instant case without any need to discuss

the Twenty-First Amendment. We shall show that this Court has not followed Crownover and shall show how its reasoning is erroneous.

Crownover was decided after La Rue. But if conduct such as that described in Rule 143.3 could be regulated or prohibited without regard to the Twenty-First Amendment, this Court would have said so in La Rue. Since this Court felt constrained to reach the Twenty-First Amendment issue, it is clear that it would not agree with Crownover. Cases decided after Crownover support this view.

The most important of the post-Crownover cases is Doran v. Salem Inn, Inc., supra, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648, which also involved a municipal ordinance regulating topless entertainment, but which reached the opposite result. The Supreme Court affirmed the granting of a preliminary injunction on the basis that the ordinance was probably unconstitutional, holding:

> "Although the customary 'barroom' type of nude dancing may involve only the barest of protected expression,

> we recognized in California v. La Rue . . . that this form of entertainment might be entitled to First Amendment protection under some circumstances. In La Rue, however, we concluded that the broad powers of the states to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as part of its liquor license program.
>
> "In the present case, the challenged ordinance applies not merely to places which serve liquor, but to many other places as well." (422 U.S. at 932-933, 95 S.Ct. at 2568)

The court went on to conclude that the appellees, who were owners of topless nightclubs, had standing to challenge the constitutionality of the municipal ordinances on the grounds of overbreadth.

Doran stands as a clear repudiation of the result in Crownover. Although Crownover had been decided two years earlier,

it was not referred to in the Salem Inn opinion, and there were no dissenting opinions. It is clear, then, that this Court has rejected the speech-conduct dichotomy, for otherwise it would have followed Crownover and held the New York ordinance valid on its face. However, Justice Rehnquist clearly describes the ordinance as a "ban of such dancing" rather than a regulation of conduct, and applies classic First Amendment analysis to the constitutional issues.

In retrospect, Crownover's reasoning was defective in two major respects: it misread La Rue and it downgraded the constitutional protection afforded to commercial speech.

Supreme Court opinions other than Salem Inn have described La Rue as standing for the proposition that nude dancing is protected by the First Amendment. Craig v. Boren, which will be discussed at length later, described La Rue as permitting regulation of:

> ". . . live entertainment at establishments licensed to dispense liquor. . ." (Craig v. Boren (1976)

> 97 S.Ct. 451, 462) [emphasis added]

City of Kenosha v. Bruno described La Rue as holding that:

> ". . . regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances were facially constitutional. (City of Kenosh v. Bruno (1973) 412 U.S. 507, 515, 93 S.Ct. 2222, 2227, 37 L.Ed.2d 109) [emphasis added]

The other significant error in Crownover was its conclusion that nude dancing was merely a "sales gimmick" and therefore not worthy of constitutional protection. However, several cases decided since Crownover have made it clear that commercial speech is protected by the First Amendment, even when contained in advertisements, and that while commercial speech may be more closely regulated than political speech, it may not be totally prohibited. Bates v. State Bar of Aarizona (1977) 97 S.Ct. 2961, 2968-2970; Virginia Pharmacy Board v. Virginia Consumer Council (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 346;

Young v. American Mini Theaters (1976) 427 U.S. 50, 96 S.Ct. 2440.

Since Doran v. Salem Inn, Inc. only involved the propriety of a prelminiary injunction, the court did not make an ultimate determination of the ordinance's constitutionality. Doran v. Salem Inn, Inc., supra, 95 S.Ct. at 2569. This does not, however, distinguish Doran from Crownover, since the two cases were procedurally identical. Crownover also came before the California Supreme Court on an appeal from an order granting a preliminary injunction, without any factual record. Thus, Crownover is totally inconsistent with Salem Inn and must be regarded as without further validity.

The cases decided by this Court since La Rue make it clear that the constitutionality of A.B.C. Rule 143.3 was dependent on the "strengthening power" of the Twenty-First Amendment, without which it too would be unconstitutional. In the balance of this brief we shall show that such "strengthening power" does not exist and that post-La Rue cases interpreting the Twenty-First Amendment have left La Rue

bereft of logical support.

E. No Case Other Than California v. La Rue Has Held that the Twenty-First Amendment Authorizes States to Restrict Constitutional Rights in the Name of Alcoholic Beverage Regulation

Section 2 of the Twenty-First Amendment provides as follows:

> "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Section 2 is essentially the same as the Webb-Kenyon Act, 27 U.S.C. 122, enacted March 1, 1913, C. 90, 37 Stat. 696. Its purpose was to enshrine in the Constitution the right of states to prohibit (and thus remain dry) or regulate the importation and transportation of alcoholic beverages free of limitations that might flow from the commerce clause, and thus to confirm the existence of state regulatory power as it existed prior to prohibition. Indeed, as originally proposed, Section 2 began with an express reference to the

commerce clause:

> "The provision of Clause 3 of Section 8 of Article I of the Constitution . . . shall not be construed . . ." 74 Cong. Rec. p. 65.

Even after the proposal was changed to its present form its sponsor, Senator Blaine, described it as a bill restoring to the states the right to regulate commerce in intoxicating liquors (74 Cong. Rec. p. 4141) while Senator Borah described the Twenty-First Amendment as incorporating the Webb-Kenyon Act into the Constitution. (74 Cong. Rec. p. 4172).

In addition to Section 2, which restored to the states their power to regulate commerce in alcoholic beverages, an early draft of the Twenty-First Amendment also contained a third section which would have granted concurrent power to the states and Congress to regulate or prohibit sales of alcoholic beverages for consumption on the premises (e.g., in bars, saloons and restaurants). (74 Cong. Rec. p. 1621) Section 3 was deleted because it was inconsistent with the restoration of states' rights, and would leave open the

possibility of enforced national prohibition or national repeal. (Remarks of Senator Black, 74 Cong. Rex. p. 4177) It must be remembered that the Eighteenth Amendment had taken from the states all power to impose regulations which conflicted with national prohibition, Vigliotti v. Pennsylvania (1922) 258 U.S. 403, 42 S.Ct. 330. On the other hand, national prohibition did not repeal the Webb-Kenyon Act, and states did remain free to impose stricter prohibition. McCormick & Co. v. Brown (1932) 286 U.S. 131, 52 S.t. 522, 76 L.Ed. 1017. As enacted, then, the Twenty-First Amendment contained two active parts. Section 1 repealed the Eighteenth Amendment, thereby restoring to the states the full scope of police power regulation over alcoholic beverages. Section 2 incorporated the Webb-Kenyon Act into the Constitution, thereby permitting the police power to be exercised without regard to the interstate character of any transaction, in order to enforce local prohibition. But the Twenty-First Amendment did not otherwise grant any authority for states to act free of the restraints of the Federal Constitution.

Cases decided prior to La Rue have recognized that the limited purpose of the Twenty-First Amendment was to permit states to legislate in a manner which would otherwise violate the commerce clause. Carter v. Virginia (1944) 321 U. S. 1313, 64 S.Ct. 464, 88 L.Ed. 605; State Board of Equalization v. Young's Market Co. (1936) 299 U.S. 59, 57 S,Ct. 77, 81 L.Ed. 458. Even that general rule was subject to some exceptions, however. Thus, Hostetter v. Idlewild Bon Voyage Liquor Corp. (1964) 377 U.S. 324, 84 S. Ct. 1293, 12 L.Ed.2d 350, held that liquor sold for delivery in a foreign country could not be subject to state tax, because:

> "Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in light of the context of the issues and interests at stake in any concrete case." (377 U.S. at 332)

In Collins v. Yosemite Park and Curry Co. (1938) 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502, the court held that a state could not regulate importation through its territory into a national park, since the shipment was not for "delivery or use" in the state. The same result was applied to shipments to a federal military reservation, Johnson v. Yellow Cab Co. (1944) 321 U.S. 383, 64 S. 622 88 L.Ed. 814. These cases demonstrate the extent to which the court preferred a narrow construction of the Twenty-First Amendment to one which would have claimed from it a broad grant of state power.

A similarly narrow reading of the Twenty-First Amendment appears in Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 in which the California Supreme Court held that a statute restricting the employment of female bartenders violated both the equal protection clause and the 1964 Civil Rights Act. In rejecting an argument that the Twenty-First Amendment granted plenary power to the states to regulate alcoholic beverages unfettered by the commerce clause or by

federal legislation passed pursuant thereto, the court reviewed the history of the Twenty-First Amendment and concluded that it did not work a "wholesale repeal" of the commerce clause in the area of alcoholic beverage control. (5 Cal.3d at p. 11) More importantly, the court held:

> "Section 25656 is not even tangentially related to 'transportation and importation' of liquor into California and therefore does not fall within the literal language of the Twenty-First Amendment. The statute merely regulates employment at the retail level, and has nothing to do with the flow of alcoholic beverages into the state." (Id, 5 Cal.3d at pp. 12-13, 95 Cal. Rptr. at p. 336)

The Twenty-First Amendment cases decided by this Court between La Rue and Craig v. Boren did not alter the earlier construction of the Amendment, and did not refer to or cite La Rue. Heublein, Inc. v. South Carolina Tax Commission (1972) 409 U.S. 275, 93 S.Ct. 483, 34 L.Ed.2d 472 was decided only two weeks after La Rue. In

order to comply with South Carolina liquor regulations, Heublien employed a resident agent in South Carolina to whom all liquor shipments were sent. As a result, Heublein became liable for state income taxes. Heublien contended that it only "did business" in South Carolina because of the state licensing requirement, which it viewed as an evasion of the limitations contained in 15 U.S.C. § 381(a)(1) prohibiting a state from imposing a net income tax under certain circumstances. The court ruled that South Carolina had enacted a valid regulatory scheme which served legitimate state purposes and which was not intended to evade Section 381, and that it was not necessary to rely upon the Twenty-First Amendment to sustain the imposition of the income tax on Heublin (409 U.S. at p. 282, fr. 9, 9, 93 S.Ct. at 488).

United States Tax Commission v. State Tax Commission of Mississippi (1973) 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 involved the federal enclave problem. Mississipi created a state agency which had the exclusive power to import alcoholic beverages. It required military post exchanges

which purchased directly from out of state manufacturers to pay the state an amount equal to the wholesale markup which would have been charged. The post exchanges did not operate with federal funds and did not limit sales to residents of the base. The court followed Collins v. Yosemite Park and Curry Co., supra, 304 U.S. 518, 58 S. Ct. 1009, 82 L.Ed. 1502 in holding that, as to those military bases subject to exclusive federal jurisdiction, the wholesale markup could not be collected because the shipments were not for delivery in the state, thereby confirming a literal construction of the Twenty-First Amendment. A dissenting opinion filed by Justices Douglas and Rehnquist concluded that the markup was a valid state tax, but neither opinion referred to or cited La Rue or made any reference to the alleged "strengthening" power of the Twenty-First Amendment.

F. Craig v. Boren Confirms the Strict Construction of the Twenty-First Amendment and Fatally Contradicts California v. La Rue

In the preceding portions of this argument

we have demonstrated that dance is a form of communication protected by the First Amendment, that laws generally prohibiting nudity or sexual conduct as part of the dance must comply with the standards for controlling obscenity, and that the Twenty-First Amendment has been confined to permitting some state regulation of interstate commerce in alcoholic beverages. We shall show now that the result achieved in La Rue was wholly dependent upon its unprecedented interpretation of the Twenty-First Amendment, which interpretation has been repudiated in Craig v. Boren.

The majority opinion in La Rue was written by Justice Rehnquist, joined in by Justices Stewart, White, Blackmun, Powell, and by Chief Justice Burger. Justice Stewart filed a concurring opinion explaining his position. Dissenting opinions were filed by Justices Douglas, Brennan and Marshall. California v. La Rue, 309 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 551.

The majority opinion began its analysis of the constitutionality of Rule 143.3 with the following quotation:

"Consideration of any State law

regulating intoxicating beverages must begin with the Twenty-First Amendment, the second section of which provides that: 'the transportation or importation to any State, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.'" Seagram and Sons v. Hostetter (1966) 384 U.S. 35, 41.

The court then leaped to the conclusion that

". . . the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." California v. La Rue, supra, 409 U.S. at p. 114.

The court based its assertion on quotations from two other cases: (Id. at pgs. 114-115)

" . . . a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined

for use, distribution, or consumption within its borders." Hostetter v. Idlewild Liquor Corp. (1964) 377 U.S. 324, 330.

"A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." State Board v. Young's Market Co., 299 U.S. 59, 64.

Although neither of the above quotations broadens the Twenty-First Amendment beyond the context of the commerce clause nor alters its concern with importation and transportation into a state, the majority upheld the validity of Rule 143.3 because of:

". . . the added presumption in favor of the validity of the state regulation in this area which the Twenty-First Amendment requires. . ." California v. La Rue, 409 U.S. at pgs. 118-119.

Since the majority conceded that "at least some of the performances to which these regulations address themselves are within the constitutional limits of freedom of expression," (Id., 409 U.S. at p.

118, the sine qua non for the court's conclusion was the "added presumption" engendered by the Twenty-First Amendment. Although the majority did not describe the scope of this "added presumption", its effect may be deduced from the opinion itself. Apparently, the added presumption permitted the employment of the "rational basis" test used in analysis of economic due process and equal protection cases, rather than the stricter "suspect classification" and "clear and present danger" tests utilized when First Amendment of other fundamental rights are at stake. The majority cited Williamson v. Lee Optical Co. (1955) 348 U.S. 483, 487-488, 75 S.Ct. 461, 99 L.Ed. 563, the quintessential rational basis case, for the proposition that the choice of a prophylactic rule was "not an unreasonable one." (Id, 409 U.S. at p. 116) It did not apply traditional First Amendment analysis. Thus, the "presumption" really reads the First Amendment out of the case and transformed the issue into one not involving protected freedoms.

Justice Stewart concurred, stating that

he viewed the rule as the equivalent of a limitation on the places where liquor may be sold or dispensed, and not as a restriction on speech. Justice Douglas dissented on the basis that the case was not ripe for decision. The dissent of Justices Marshall and Brennan will be discussed below.

The majority opinion has been subjected to severe criticism because of the absence of any authority or justification for extending the Twenty-First Amendment into areas unrelated to the commerce clause. See Shapiro, "Mr. Justice Rehnquist: A Preliminary View" 90 Harv. L.R. 293, 305 (1976); 7 Urban Law Annual 421, 429 (1974). Craig v. Boren (1976) 429 U.S. 190, 97 S.Ct. 451 appears to have finally returned to the traditional view of the Twenty-First Amendment.

Craig v. Boren involved a challenge to an Oklahoma law which permitted females to purchase 3.2 beer at age 18 but required males to wait until they were 21. Justice Brennan, who had dissented in La Rue, wrote an opinion for the court which held the law to be a violation of equal protection. The opinion was joined by Justices White, Marshall, and Powell. Justice Powell wrote a concurring opinion,

Justice Stevens also concurred and wrote an opinion that did not discuss the Twenty-First Amendment. Justices Stewart and Blackmun concurred in the result but not the court's analysis of the Twenty-First Amendment. Justice Rehnquist and Chief Justice Burger wrote dissenting opinions which did not cite La Rue or rely upon its conclusions.

The district court, citing La Rue, had sustained the validity of the statute on the basis that the Twenty-First Amendment had strengthened the state's police powers with respect to alcohol regulation. 399 F.Supp. 1304, 1307. This Court rejected that conclusion. The court concluded, in reviewing the history of the Twenty-First Amendment and the cases decided thereunder, that Section 2 closely followed the Webb-Kenyon Act and was intended to constitutionalize it. Craig v. Boren, 97 S.Ct. at 461. The court then held:

> "Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-First Amendment to other constitutional provisions becomes increasingly doubtful.

> As one commentator has remarked, '[n]either the test nor the history of the Twenty-First Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' P. Brest, Processes of Constitutional Decisionmaking 258 (1975). Any departures from this historical view have been limited and sporadic." (Id., 97 S.Ct. at 461)

The court then proceeded to limit and distinguish the cases which La Rue had cited in its discussion of the Twenty-First Amendment.

La Rue had quoted Seagram's and Sons v. Hostetter, 384 U.S. 35, 41 to establish that primary consideration must be given to the Twenty-First Amendment. Craig v. Boren pointed out that the case only involved a Fourteenth Amendment challenge to an economic regulation decided on traditional due process grounds, (97 S.Ct. at 462) and, thus, did not really involve the Twenty-First Amendment at all.

The next case quoted in La Rue was Hostetter v. Idlewild Bon Voyage Liquor Corp. 377 U.S. 324. Craig v. Boren pointed out that it stood only for the proposition that states have clear regulatory power over importation of intoxicants, (97 S.Ct. at 462), a scope well within the commerce clause relationship.

Finally, La Rue quoted State Board v. Young's Market Co., 299 U.S. 59, 64, for the proposition that "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." Craig v. Boren, however, limited Young's Market as a case centering "upon importation of intoxicants" which "touched upon purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment" (97 S.Ct. at 462). In other words, the court said, the standard of review applied was not determined by the Twenty-First Amendment, but by the Fourteenth. The court also directly distinguished and limited the "dictum" from Youngs' Market in footnote 21 at page 462, on the basis that (1) classifications based upon gender are not recognized by the Twenty-First Amendment and (2) the

"statement has not been relied upon in recent cases that have considered Fourteenth Amendment challenges to state liquor regulation." Thus, the court recognized that the Twenty-First Amendment only "recognizes" those classifications which relate to the importation and transportation of alcoholic beverages into a state.

Craig v. Boren did not directly overrule or approve La Rue. Instead, it acknowledged its existence and distinguished it sharply:

> "It is true that California v. La Rue, 409 U.S. 115, 93 S.Ct. 390, 395, 34 L.Ed.2d 342 (1972), relied upon the Twenty-First Amendment to 'strengthen' the state's authority to regulate live entertainment as establishments licensed to dispense liquor, at least where the performances 'partake more of gross sexuality than of communication.' Id. at 118, 93 S.Ct. 397. Nevertheless, the court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination." (97 S.Ct. at 462).

However, the key fact is that Craig v. Boren clearly establishes that there is nothing in the Twenty-First Amendment applicable to regulations of live entertainment, in on-sale establishments, since the subject has nothing to do with importation or transportation of alcoholic beverages into the state.

La Rue cannot be distinguished from Craig v. Boren on the basis of the constitutional importance of the matters being regulated. Such a distinction was relied upon by the Appeals Board in its opinion in this case. (Appendix B. pg. 10) Although the constitutional right to be free from invidious discrimination is concededly important, no one has suggested that it is of greater importance than the right of free speech. Even if it be conceded that "barroom nude dancing" has less constitutional protection than other forms of speech, the two cases are indistinguishable. The concurring opinion of Justice Stevens clearly pointed out the limited social impact of the regulations before the court in Craig v. Boren.

The inherent inconsistency between

La Rue and Craig v. Boren is reflected in the extensive discussion in Craig of the proper standard to be applied in making the equal protection analysis. In La Rue, as we have shown above, the court applied a due process "rational basis" test to an issue that would ordinarily be treated as a "suspect classification", namely a content-related prohibition of speech. That is to say, La Rue used the alleged strengthening power of the Twenty-First Amendment to change the test of validity itself. A similar approach in Craig v. Boren would have obviated any need for further discussion of standard of review, and permitted affirmance of the Oklahoma statute by application of the rational basis test as was done in La Rue. The failure of any justice to take this approach demonstrates the clear repudiation of La Rue and clearly demonstrates the irrelevance of the Twenty-First Amendment to the validity of any state alcoholic beverage law which does not regulate interstate commerce.

G. Rule 143.3(1)(c) Is Unconstitutional Because (1) It Prohibits Speech Which Is Protected by the First Amendment and (2) It Invidiously Discriminates Between Permitted and Prohibited Entertainment on the Basis of the Dress and Appearance of the Entertainer

Having established that nude entertainment is subject to prima facie protection of the First Amendment, Doran v. Salem Inn, Inc., supra, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 and that the Twenty-First Amendment can no longer be relied upon to "strengthen" their constitutionality, we now will demonstrate the facial unconstitutionality of Rule 143.3(1)(c) under First Amendment standards.

We return to the text of Rule 143. As applied here, it generally permits live entertainment in licensed establishments, including entertainment involving exposure of the breasts and buttocks, but prohibits entertainment which involves any exposure of the pubic hair, genitals, anus or vulva. Thus, Rule 143 distinguishes between types of entertainment on the basis of content. Contrary to the view expressed

by Justice Stewart in his concurring opinion in La Rue, it is not the equivalent of a prohibition of dancing generally in licensed establishments, nor is it the equivalent of a rule that liquor cannot be sold in bookstores, churches or gas stations. California v. La Rue, supra, 409 U.S. at 119-120. Instead, it is the equivalent of a rule which prohibits the reading of selected books in bars, or the presentation of certain plays. Its constitutionality must be judged on the basis of the standards applied to content-related restrictions on speech.

For this and other reasons, Rule 143.3(1)(c) cannot be sustained as a valid "time, place and manner regulation." Even though its prohibition of nude entertainment is limited to premises licensed to sell liquor (including wine and beer) by the drink, it places substantial restrictions on the availability of such entertainment. Two recent cases illustrate this point.

Erznoznik v. City of Jacksonville (1975) 422 U.S. 209, 95 S.Ct. 2268, 45 L.Ed.2d 125 involved an ordinance which

prohibited drive-in theaters from exhibiting films containing nudity (defined as exposure of breasts, buttocks or pubic areas) if the screen is visible from a public street or public place. Even though the same films could be exhibited in a suitably enclosed drive-in theater, the court found it imposed a substantial restraint on expression, in part, because of the cost of blocking a drive-in theater from public view. Similarly, it is a significant restraint on speech to require one who holds a liquor license to surrender its privileges in order to present certain kinds of entertainment. The court also held that the Jacksonville ordinance was not one regulating time, place and manner because it was not applicable to all speech irrespective of content.

In Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50, 96 S.Ct. 2440, the court held constitutional an ordinance placing certain restrictions on the location of adult theaters. However, the ordinance did not prohibit such theaters entirely, and the court's ruling was premised on the assumption that the ordinance

did not limit the total number of adult theaters that could operate, did not deny access to the market to distributors, exhibitors or the viewing public (96 S.C. at 2448) and did not affect the operation of existing theaters (96 S.Ct. at 2453). By contrast, Rule 143.3 affects all licensed premises and substantially suppresses and restricts access to lawful speech.

The next issue which must be dealt with is the standard to be applied in determining the constitutional question. It must be remembered that in La Rue the state sought to justify its regulation on the basis of various illegal or illicit sexual acts which occurred at or around premises which offered nude entertainment, and that the regulation was intended to forestall such acts. California v. La Rue, supra, 409 U.S. at p. 11, 93 S.Ct. at 393. Thus, we will establish that the state's legitimate interest in preventing illegal sexual activity does not justify Rule 143.3's prohibition of non-obscene nude entertainment.

We adopt and advocate the approach taken in the dissenting opinion of Justices

Marshall and Brennan in California v. La Rue.

That opinion commenced by stating the propositions that the state's power to regulate alcoholic beverages does not permit broad restraints on First Amendment freedoms, and that it was not relevant that the state sought to prohibit bachanallian revelries rather than performances by scantily clad ballet troupes.

> "Whatever the state 'sought' to do, the fact is these regulations cover both these activities. And it should be clear that a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute." California v. La Rue, 409 U.S. at p. 125, fr. 3, 97 S.Ct. at 401. (dissent)

More specifically, the dissenters observed that the purpose of the regulation was no different than any other restriction on erotic expression, and the court has repeatedly ruled that such prohibition can

be accomplished only by adhering to the constitutional definition of obscenity.

> ". . . the State's interest in controlling material dealing with sex is secondary in nature. It can control rape and prostitution by punishing those acts, rather than by punishing the speech that is one step removed from the feared harm. Moreover, because First Amendment rights are at stake, the State must adopt this 'less restrictive alternative' unless it can make a compelling demonstration that the protected activity and criminal conduct are so closely linked that only through regulation of one can the other be stopped." California v. La Rue, 409 U.S. at 131, 132, 93 S.Ct. 404. (dissent)

The dissenters than observed that the classification created by Rule 143.3 was content-related and therefore suspect, whether the test is found in the Equal Protection Clause or the First Amendment. They also concluded that the test

set forth in United States v. O'Brien 389 U.S. 367 could not be applied because the rule regulated free expression directly rather than indirectly.

The performances in the instant case took place on a stage in a premise that held itself out to be a theater. The only remarkable thing about the performances was the nudity of the dancers; there were no lewd gestures, and none of the consequences used in La Rue to justify their prohibition. There was no gross sexuality and there were no bachanallian revelries. Thus, as applied herein, no compelling purpose is served by permitting suppresion of these performances.

In summary, A.B.C. Rule 143.3(1)(c) is unconstitutional on its face and as applied herein because it prohibits licensed establishments from offering entertainment which involves nudity but is not obscene.

Respectfully submitted,
KENNETH P. SCHOLTZ
Attorney for Appellant

APPENDIX "A"

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

File 50248

Reg. 5365

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by a Hearing Officer of the Office of Administrative Procedure, adopted said proposed decision as its decision in the case therein described on February 17, 1977.

A representative of the Department will call on you on or after April 7, 1977 to pick up the license certificate.

Sacramento, California
Dated: February 17, 1977

/s/ Beatrice Smalley
Hearing and Legal Unit

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

In the Matter of the Accusation Against: M.R.T.S., INC. dba Classic Cat (Pub 'N Grub) 5505 Jackson Drive La Mesa, CA 92041 On-Sale General Bona Fide Public Eating Place	File 50248 Reg. 5365 Folios Licenses: 47-50248 cond. 1 Time of Hearing: October 28, 1976 9:00 a.m. Place of Hearing: 1350 Front Street San Diego, CA Reporter: (Outside) L-11730 Appearances: For Dept: Thomas R. Anderson, Counsel For Resp: Kenneth P. Scholtz, Atty. 314 S. Beverly Drive, Suite 406 Beverly Hills, CA 90212

RECEIVED
JAN 2 1977
Hearing and Legal Unit
Dept. of Alcoholic
and Beverage Control
Sacramento

under the Alcoholic Beverage Control Act.

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

PROPOSED DECISION

Briefs were filed by the parties. Respondent's brief received November 8, 1976 was marked Exhibit C for identification. The Agency brief was received December 2, 1976 and marked Exhibit 2 for identification, the matter was heard with Reg. 2028, L-11058.

FINDINGS OF FACT:

COUNT I

It was established that on or about March 12, 1976, the above-named on-sale licensee did permit a female, known only as Mary, further described as approximately 5'6", 130 lbs., auburn hair, and a female, name unknown, described as approximately 5'8", 130 lbs., auburn hair, to perform acts in the above-designated on-sale licensed premises at which time said females did display their pubic hair.

COUNT II

It was established that on or about March 13, 1976, the above-named on-sale licensee did permit a female, name unknown, further described as approximately 5'6", 125 lbs., brown hair, and a female, name unknown, further described as approximately 5'4", 115 lbs., short blond hair, to perform acts in the above-designated on-sale licensed premises at which time said females did display their pubic hair.

COUNT III

It was established that on or about March 18, 1976, the above-named on-sale licensee did permit Mary Arjean VanDusen and Linda Marie Myers, to perform acts in the above-designated on-sale licensed premises at which time said Mary Arjean VanDusen and Linda Marie Myers did display their pubic hair.

COUNT IV

On or about March 20, 1976, the above-named on-sale licensee did permit Pam Henderson to perform acts in the above-designated on-sale licensed premises at which time said Pam Henderson did display her pubic hair.

DETERMINATION OF ISSUES PRESENTED:

1. Respondent has violated Rule 143.3 (1)(c) of the Rules and Regulations of the Alcoholic Beverage Control Act as to Count I.

2. Respondent has violated Rule 143.3 (1)(c) of the Rules and Regulations of the Alcoholic Beverage Control Act as to Count II

3. Respondent has violated Rule 143.3 (1)(c) of the Rules and Regulations of the Alcoholic Beverage Control Act as to Count III.

4. Respondent has violated Rule 143.3 (1)(c) of the Rules and Regulations of the Alcoholic Beverage Control as to Count IV.

5. Grounds for disciplinary action against respondent's license have been established pursuant to Sections 24200(a) and (b) of the Business and Professions Code and Article XX, Section 22 of the California Constitution.

PENALTY OR RECOMMENDATION:

1. The license is suspended twenty (20) days as to Count I.

2. The license is suspended twenty (20) days as to Count II.

3. The license is suspended twenty (20) days as to Count III.

4. The license is suspended twenty (20) days as to Count IV.

5. The suspensions are to run concurrently.

Dated at Los Angeles, California;
January 18, 1976

/s/ Willis Mevis
WILLIS MEVIS
Administrative Law Judge
Office of Administrative Hearings

WM:mh

APPENDIX "B"

F I L E D

SEP 13 1977

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

BEFORE THE ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation Against	AB-4437 File No. 50248; Reg. No. 5365 ALJ: Mevis
M.R.T.S., Inc. dba Classic Cat (Pub 'N Grub) 5505 Jackson Drive La Mesa, California	Date and Place of Hearing: July 27, 1977 314 West First St. Los Angeles, CA
Respondent and Licensee On-sale general conditional license Under the Alcoholic Beverage Control Act.	For Department: Honorable Evelle J. Younger Attorney General Scott Rasmussen Deputy Attorney General (William R. Winship, Jr., Esq.)
	For Appellant: Kenneth P. Sholtz, Esq.

M.R.T.S., Inc., doing business as Classic Cat (Pub 'N Grub), has appealed a decision of the Department of Alcoholic Beverage Control which determined that

respondent violated Rule 143.3(1)(c) 1/ of the department as to Counts I, II, III, and IV; and that grounds for disciplinary action against respondent's license have been established pursuant to section 24200, subsections (a) and (b), of the Business and Professions Code and Article XX, section 22 of the California Constitution. As a penalty the license was suspended for 20 days as to each of said counts, said suspensions to run concurrently.

The department's decision further provides:

"FINDINGS OF FACT:

"COUNT I

"It was established that on or about March 12, 1976, the above-named on-sale licensee did permit a female, known only as Mary, further described as approximately 5'6", 130 lbs., auburn hair, and

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1/ Rule 143.3(1)(c), states in pertinent part: "Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:

* * *

"(c) The displaying of the pubic hair, anus, vulva or genitals."

a female, name unknown, described as approximately 5'8", 130 lbs., auburn hair, to perform acts in the above-designated on-sale licensed premises at which time said females did display their pubic hair.

"COUNT II

"It was establihsed that on or about March 13, 1976, the above-named on-sale licensee did permit a female, name unknown, further described as approximately 5'6", 125 lbs., brown hair, and a female, name unknown, further described as approximately 5'4", 115 lbs., short blond hair, to perform acts in the above-designated on-sale licensed premises at which time said females did display their pubic hair.

"COUNT III

"It was established that on or about March 18, 1976, the above-named on-sale licensee did permit Mary Arjean VanDusen and Linda Marie Myers, to perform acts in the above-designated on-sale licensed premises at which time said Mary Arjean VanDusen and Linda Marie Myers did display their public hair.

"COUNT IV

"On or about March 20, 1976, the above-named on-sale licensee did permit Pam Henderson to

perform acts in the above-designated on-sale licensed premises at which time said Pam Henderson did display her pubic hair."

Appellant appeals pursuant to Business and Professions Code section 23084.

In its opening brief, appellant states on page two that: "Respondent does not contest the facts, which show that female dancers performed dances on the stage at respondent's premises while nude, and that the dancer's (sic) pubic hair was thus exposed."

The board's review of the transcript indicates that the department had substantial evidence to make its findings vis-a-vis Counts I through IV. The testimony of the department investigators indicated that the several females in Counts I through IV were performing "go-go" type dance routines in the subject premises while totally nude (R.T. 4-12).

At the hearing, the department introduced an internal diagram of the licensed premises (Department's Exhibit 1). The respondent introduced: an internal sketch of the licensed premises (Respondent's Exhibit A); a certified copy of Ordinance No. 2055 of the La Mesa Municipal Code, which prohibits the exposure by waiters and entertainers of their genitalia, buttocks or breasts while in a food or beverage establishment, other than a theater or concert hall, effective after the 23rd day of March, 1976 (Respondent's Exhibit B); and, City of La Mesa Business Licenses for the subject address, with the word

"Theater" after the name of the licensee, covering a period from February 6, 1976 to December 31, 1976 (Respondent's Exhibit C).

Raymond C. Rohm, an officer of the subject licensee corporation during the period covered in the accusation, testified as to its theater status. There is a sign in front of the subject premises and a banner across the front of the building which describes the premises as Classic Cat Theater (R.T. 38); there is a sign at the entrance which states "Classic Cat Theater Presents Live Nude Shows" (R.T. 38); there is a $2.00 admission charge for entering (R.T. 38); there is an admission card which entitles the bearer to enter, valid for a year (R.T. 38-39); alcoholic beverages are served by waitresses in the subject premises (R.T. 39); the Classic Cat is licensed as a theater in the City of La Mesa (referring to Respondent's Exhibit C), the numbers on the license, 1-5820 and 1-7214, were described to him by the city clerk as indicating it is a drinking establishment and a live stage theater (R.T. 41); he was not able to locate any ordinances that referred to the presentation of nude entertainment in the City of La Mesa (R. T. 43); the Chief Investigator from the La Mesa Police Department brought him the ordinance, which is Respondent's Exhibit B, and stated that the respondent would have to comply with the ordinance immediately (R.T. 44); Mr. Rohm pointed out to the investigator that the ordinance exempted theaters and that the subject licensee had a theater license (R.T. 46); since the date of that discussion, no

criminal or administrative proceedings have been commenced against the subject licensee or Mr. Rohm for violating said ordinance (R.T. 46); they have a stage with movable scenery (R.T. 51-52); however, the licensed premises did not have seats which were bolted to the floor on the dates in the accusation here in question (R.T. 48). There is a counter surrounding the stage (R.T. 49); and, he has five tables located in the premises for the serving of dinner, as a restaurant is still operated in the subject premises (R.T. 50-51).

Kenneth P. Scholtz, the attorney for the respondent, testified for the respondent. Prior to the tenth of March, 1976, he visited the La Mesa City Hall and reviewed the entire code of the City of La Mesa for the purpose of determining whether there were any provisions regarding nude entertainment; he found there were not; this occurred in the month prior to March 10, 1976 (R.T. 53).

Appellant's sole contention that the department rule, (section 143.3, Title 4, California Administrative Code) impinges on free speech in violation of the First Amendment of the United States Constitution by prohibiting non-obscene entertainment, is devoid of merit. This issue has been raised before the appeals board and appellant courts on numerous occasions without success.

In California v. LaRue, 409 U.S. 109 [93 S.Ct. 390], the United States Supreme Court held that regulations prohibiting the sale of liquor by the drink on

premises where there were nude, but not necessarily obscene, performances were facially constitutional. The court stated in pertinent part:

> "We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under Roth and and subsequent decisions of this Court. See, e.g., Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352 (1958), rev'g per curiam, 101 U.S. App. D.C. 358, 249 F.2d 114 (1957). But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in O'Brien, supra." (Emphasis added.)

* * *

> "The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits

of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." (Emphasis added.)

The Court in LaRue, supra, thus held that the type of dancing proscribed by the rule, when it occurs in a licensed premises which sells liquor by the drink, is not protected by the First Amendment.

The case of Doran v. Salem Inn, Inc. (1975) 95 S.Ct. 2561, 2568-2569, reaffirmed the LaRue decision. Therein, the United States Supreme Court, when discussing "customary 'barrom' type of nude dancing," stated in part:

"Although the customary 'bar room' type of nude dancing may involve only the barest minimun of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118, 93 S.Ct. 397, 307, 34 L.Ed.2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program.

"In the present case, the challenged ordinance applies not merely to places which serve liquor, but to many other establishments as well." (Emphasis added.)

* * *

". . . the ordinance would therefore be constitutionally valid under LaRue, supra, if limited to places dispensing alcoholic beverages, the ordinance in this case is not so limited." (Emphasis added.)

Furthermore, in the case of Crownover v. Musick, 9 Cal.3d 405, which involved local ordinances (adopted pursuant to Penal Code sections 318.5 and 318.6) prohibiting specific behavior (i.e., "topless" or "bottomless" exposure) by particular persons in designated establishments, other than theaters, the California Supreme Court ruled that the ordinances were directed at conduct; hence, they did not on their face infringe upon the rights of freedom of speech or expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution or by Article I, section 9 of the California Constitution. In Crownover, the California Supreme Court also referred to statements made by the United States Supreme Court in Cox v. Louisiana (1), 379 U.S. 536, and Cox v. Louisiana (2) 379 U.S. 559, including the statement "the examples are many of the application by this court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." (Also see Cristmat, Inc. v. County of Los Angeles, 15 Cal.App.3d 590.)

Appellant's argument that Craig v. Boren, (1976), 97 S.Ct. 451 "does not overrule" LaRue, but "places. . .it on a limb with 'limited and sporadic' departures from the historical view that the Twenty-First Amendment is essentially limited to validating state laws which invade the Commerce Clause" (Appellant's Opening Brief, p. 6) is essentially an admission that the state of the law is the same in this area as it has been since the U. S. Supreme Court's opinions in LaRue (1972) and Salem Inn (1975) removed barroom nude dancing, as under our facts, from the ambit of the First Amendment. Moreover, Craig v. Boren, supra, 97 S.Ct. 451, in referring to the LaRue decision constitutes obiter dictum since the opinion therein was buttressed upon equal protectin vis-a-vis sex discrimination in the serving of beer, not upon free speech allegations as in LaRue; the very words quoted in appellant's brief from the Craig opinion make the differentiation between equal protection and First Amendment rights in juxtaposition between LaRue and Craig need be made by the appeals board; the Craig dicta simply distinguished LaRue, without criticism. Appellant's argument on this issue appears to be longer on shadow than substance.

There is no merit as to the issue raised upon appeal. The evidence supports the findings, and the findings support the department's decision, which is affirmed.

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:

Patricia Wilkey
Eugene V. Lipp

APPENDIX "C"

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL -
FOURTH DIST.

F I L E D

OCT 11 1977

ERVIN J. TUSZYNSKI,
Clerk
/s/ R.J. Smith
Deputy Clerk

M.R.T.S., INC., Petitioner,	)	4 Civil No. 16888
vs.	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ETC., ET AL., Respondents.	)	Superior Court No. - ABC No. AB-4437, File No. 50248 & Reg. No. 5365.

BY THE COURT:

The petition for writ of review with stay order is denied.

/s/ Brown
Presiding Justice

Copies to:
Kenneth P. Scholtz, Esq.-BH
DEPT. OF ABC Board-SAC (2)
Attorney General-SD

APPENDIX "D"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 10 1977

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 16888

M.R.T.S., Inc.

vs.

Dept. of Alcoholic Beverage Control, et al.

Respectfully,

G. E. BISHEL
Clerk

80457-877 4-77 3M GSP

APPENDIX "E"

No. 4th CIV. 16888

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

M.R.T.S., INC., a
California corporation,
dba CLASSIC CAT THEATER,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL OF THE
STATE OF CALIFORNIA: and
ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD,

Respondents.

NOTICE OF APPEAL

TO THE UNITED STATES SUPREME COURT

KENNETH P. SCHOLTZ
Attorney at Law

315 South Beverly Drive
Suite 406
Beverly Hills, California
90212
(213) 556-3428

Attorney for Petitioner

No. 4th CIV. 16888

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

M.R.T.S., INC., a
California corporation,
dba CLASSIC CAT THEATER,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL OF THE
STATE OF CALIFORNIA; and
ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD,

Respondents.

NOTICE OF APPEAL
TO THE UNITED STATES SUPREME COURT

TO RESPONDENTS IN THE ABOVE ENTITLED CASE:

PLEASE TAKE NOTICE that petitioner, M.R.T.S., Inc. hereby appeals to the United States Supreme Court from the order of the California Court of Appeal denying petitioner's Petition for Writ of Review, which was denied October 11, 1977, Petition for Hearing denied by the California Supreme Court November 10, 1977.

Dated: November 16, 1977

KENNETH P. SCHOLTZ
Attorney for Petitioner

PROOF OF SERVICE BY MAIL (1013a,2015.5 CCP)

STATE OF CALIFORNIA, COUNTY OF

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; action; my business address is:

315 South Beverly Drive, Suite 406,

Beverly Hills, CA 90212

On November 16, 1977, I served the within

NOTICE OF APPEAL TO THE UNITED STATES

SUPREME COURT on the interested parties

in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California addressed as follows:

Dept. of ABC
1215 O Street
Sacramento, CA
95814

ABC Appeals Board
1215 O Street
Sacramento, CA
95814

Dept. of ABC
1350 Front Street
Room 5056
San Diego, CA
92101

William R. Winship,Jr.
Deputy Attorny General
110 West A Street
Suite 600
San Diego, CA 92101

Supreme Court of the State of California
4250 State Building
San Francisco, CA 94102

Executed on November 16, 1977 at
(date)
Beverly Hills, California
(place)

I declare: under penalty of perjury, that the foregoing is true and correct.

Signature
BARBARA MARTIN

APPENDIX "F"

143.3 Entertainers and Conduct. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (10 hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificual devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Note: Authority cited: Section 25750, Business and Professions Code and Section 22 of Art. XX, Calif. Constitution. Reference: Sec. 23001, Bus. & Prof. Code.

History: 1. New section filed 7-9-70; designated effective 8-10-70 (Register 70, No. 28).

SINCE 1922

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